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In the

Supreme Court of the United States

October Term, 2000

THE GOOD NEWS CLUB, ANDREA FOURNIER and DARLENE FOURNIER, Petitioners,

v.

MILFORD CENTRAL SCHOOL, Respondents

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, HORACE MANN LEAGUE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI

The interest of the *amici curiae* [1] is as follows.

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of this nation's state school boards associations. These boards govern more than 15,000 local school districts that serve more than 46.5 million public school students – over 90 percent of all elementary and secondary public school students in the nation. NSBA has had a longstanding interest in education issues, including those touching on the Establishment Clause.

The American Association of School Administrators, founded in 1865, has a membership of more than 14,000 educational leaders across North America and other countries. AASA seeks to achieve the highest quality of public education through effective school leadership.

The Horace Mann League was founded by a group of leading educators in 1922. According to the League's beliefs, our public schools should be free, classless, nonsectarian, and open to all children of all of the people. The schools should be dominated by such purposes as will ensure the preparation of children and youth for effective citizenship in our democracy.

STATEMENT OF THE CASE

The heart of this case is the authority of public school districts to prohibit outside groups from engaging in proselytizing activities and religious worship with

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Sup. Ct. Rule 37.3 The undersigned counsel has authored this brief, and no person or entity other than *Amici* has made a monetary contribution to its preparation or submission. Sup. Ct. Rule 37.6.

elementary school students immediately after the last bell while on elementary school grounds.

The Good News Club, whose activities routinely involve religious hymns and games and an opportunity to accept Jesus as a personal Savior, applied to use elementary school space for club meetings immediately following the end of the school day. After twice examining the request, the district concluded that the group's activities constituted religious worship and thus were outside the scope of the forum open for use of facilities for outside groups. The objection of officials centered on the impact to children when an adult-initiated, adult-led worship service and efforts to proselytize[2] occur with the school district's consent and apparent endorsement immediately after school.

The Good News Club's free speech claim fails because the school district did not open a limited forum or otherwise make its facilities available for outside groups, such as Good News Club, to meet during the post-school period. All other groups met during a later time frame, at least two hours after the last class ended – eliminating the very conflict that exists here. Many other groups were allowed to use school facilities. However those groups differ in that they were allowed to meet in the evening, not immediately after school and they presented no concern if the imprimatur of the school were mistakenly placed upon them.

The genuine concern of the school board that adopts such a protective stance is proper. The U.S. Supreme Court has said repeatedly that the Constitution's First Amendment Establishment Clause is violated when religious activities appear to carry the endorsement, imprimatur, or sponsorship of the public schools. That impression is unmistakable when students walk out of subject-based

[2] Contrary to Petitioners' and *Amici* arguments, religious proselytizing and instruction is no different than religious worship and religious practices. E.g. *Texas Monthly v. Bullock*, 489 U.S. 1, 23 (1989); *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943).

public school instruction and within minutes are studying faith-based materials from religious instructors. When the two events happen in such close proximity, the typical elementary school student would have a difficult time distinguishing between the school-offered programming and the religious programming offered by the religious leaders. The Court should take the opportunity to make clear that conducting worship services for elementary children on school grounds is inappropriate and a violation of the U.S. Constitution's Establishment Clause.

ARGUMENT

The heart of this case is the authority of public school districts to prohibit outside groups from engaging in proselytizing activities and religious worship with elementary students immediately after the last bell while on elementary school grounds.

As early as 1943 this Court declared that the First Amendment freedoms must receive "scrupulous protection" in schools "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[3] The U.S. Supreme Court has recognized First Amendment protections[4] should be afforded to individuals within public schools[5], tempered by the schools' primary mission to educate and instill civic values.[6] Schools thus daily walk the narrow line of respecting First Amendment rights and

[3] *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

[4] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech..." U.S.Const. Amend. 1.

[5] "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students". *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969).

[6] *Fraser v. Bethel School District No. 403*, 478 U.S. 675 (1986); *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

teaching students the responsibilities concomitant with them. That narrow line is presented in this case -- schools must heed students' First Amendment rights to free speech and free exercise of religion while adhering to the boundaries imposed upon the public schools by the Establishment Clause.

I. The district cannot be compelled to open the forum for the purpose of accommodating religious instruction.

A. Milford did not, nor does the law require it to, open a forum broad enough to encompass the Good News Club's request. Petitioners may not compel the school to open its forum merely by making allegations of religious discrimination or because they are engaged in religious activities.

Under this Court's analyses, the first step in a freedom of expression case is to determine the type of forum involved. The Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. A traditional public forum is one, like a public sidewalk, which "by long tradition or by government fiat, ... has been "devoted to assembly and debate." *Arkansas Educ. Tele. Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). A designated forum is one that is "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 802 (1985).

The public forum receives a high degree of protection; excluding speech only when the exclusion is necessary to serve a compelling state interest, See *Cornelius*, 473 U.S. at 800. The government's ability to restrict speech in a designated public forum is similarly limited. *See International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). The rules governing regulation of speech in a non-public forum are the least restrictive of the three. Indeed "limitations on expressive activity conducted on this last category of property must survive only a much more limited review." *Krishna Consciousness* at 678 – 79. As stated in *Lamb's Chapel*: "With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that' control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Lamb's Chapel* at 392- 393.

Given the dramatically different level of review that is applied, the determination of forum at the outset of the analysis is of critical importance to the outcome of each case. Here, the district never created a designated public forum open for indiscriminate public use. At best a limited forum was created for community groups to meet during the evening hours.

This Court has long recognized that public school buildings are different from other forms of public property for purposes of free speech analysis. Public school property is, first and foremost, dedicated to the mission of educating children. The school must have the power to ensure conditions that are consistent with that mission. For First Amendment purposes school districts are presumptively closed fora unless they take specific actions to open a forum to outsiders. Schools may, but do not have to, open their facilities to outside groups. As stated by this Court: "It is common ground that the District need not have permitted

after-hours use of its property". *Lamb's Chapel* at 390. Schools must by positive action open their forum for expressive activity to change this forum status. This presumption that public school grounds are closed serves to ensure that school officials can regulate the environment to focus on that mission with reasonable regulations, as opposed to compelling reasons.

In the case at bar, it is not clear that the district had opened any forum during the period immediately after the school day.[7] Here, the school permitted groups to meet, but only substantially after the school day ended. All outside organizations meeting on school grounds did so at least two hours after classes finished. Good News sought access immediately after school or during the last few hours of classroom instruction for the purpose of setting up for their religious instruction and services. The district had not opened this forum for outside use, nor must it. Like private property owners, the government has a right to exclude all others and preserve the property under its control as long as it does so on a nondiscriminatory basis. The time slot immediately after school was not open by tradition or designation; neither Good News Club nor any other outside group had a right to access to the building at this time. The school district retained control over the forum, during that sensitive time immediately after school, allowing groups to meet after 6:00 p.m. Access to the facilities only began later in the day, when school officials allowed some outside groups to meet. Good News has no right to demand the district open its forum wider than it has for other groups.

[7] This case is unlike *Good News/Good Sports Club v. School District*, 28 F.3d 1501 (8th Cir. 1994) in which the district had opened a forum immediately after school. There the district opened the facilities to all community groups except those involving religious speech. The Eighth Circuit found this resulted in viewpoint discrimination. Here Milford had not opened a similar forum.

B. The school district has the authority to limit its forum to include only those activities consistent with its mission and the stated purposes of the forum.

Further, the school has the authority to open a forum for limited uses, provided access is both reasonable in light of the purpose of the forum and viewpoint neutral[8]. Here the district during the immediate after-school hours had not opened its forum for indiscriminate use. We cannot conclude on this record that the school district clearly intended to open its doors to all activities for indiscriminate use. Contrary to the allegations made by Petitioners and their Amici, religious groups were not the only groups excluded from the limited forum opened for outside activities. The school forbade access to commercial activities, fraternal organizations, political speech, and civic meetings not open to the general public as well, citing the impressionability of students and the inappropriate subject matter on school grounds. The boundaries of the forum were both reasonable and viewpoint neutral. The school allowed late evening access to the facilities when the groups had a mission compatible with the school. Such authority is within the bounds of the First Amendment in the school

[8] This case is distinct from *Lamb's Chapel v. Center Moriches Union Free School District* on this issue. *Lamb's Chapel* stands for the proposition that traditionally protected speech – i.e. speech from a religious viewpoint—cannot be squelched. In *Lamb's Chapel* this Court ruled that the school district violated free speech rights of an evangelical church by refusing it permission to use school facilities to show a "family oriented movie --- from the Christian perspective". The school board policy allowed use of school building outside of school hours for certain designated purposes but specifically excluded religious purposes. The Court ruled that the school engaged in "viewpoint" discrimination by allowing other groups to present their views on family values but denying petitioners the right to present the subject from a religious perspective. The ruling in *Lamb's Chapel* was based on viewpoint discrimination. Here the district has not opened the forum either in time or in content.

context and indeed fulfills the school district's long-held duty.

Cases such as *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) have instructed us that "unless the schools affirmatively intend to open a forum for indiscriminate use, restrictions reasonably related to the school's mission ... do not violate the first amendment." As stated by the Ninth Circuit, quoting *Hazelwood*, "educators have the right to control expressive activity that students, parents and other members of the public 'might reasonably perceive to bear the imprimatur of the school'" *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817, 825 (9th Cir. 1991).[9]

The Fifth Circuit pointedly drew this conclusion *in Campbell v. St. Tammany Parish School Board*, 206 F.3d 482, 488 (5th Cir. 2000) explaining,

> St Tammany is attempting to open its school facilities. A contrary holding [requiring access to religious groups] would frustrate that objective and diminish, rather than increase, opportunities for freedom of speech. Under the Supreme Court's jurisprudence, a government entity such as a school board has the opportunity to open its facilities to activity protected by-the First Amendment, without inviting political and religious activities presented in a form that would disserve its efforts to maintain neutrality. We are persuaded that the Constitution does not deprive local school boards of that choice, and courts stand ready to hear complaints of pretext or bad faith. Were we to hold otherwise, a school board would be put to a choice of maintaining a public forum or no forum at all.

[9] Also *Diloreto v. Downey Unified School District*, 196 F.3d 958 (9th Cir. 1999) in which the court upheld the district's decision to refuse to post the Ten Commandments on the high school baseball field wall in spite of the presence of other posted messages and commercials. *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000) cert pending (Jan 2, 2001) in which the court upheld the district's restrictions of student graduation speeches.

The Milford school district was concerned with lending its imprimatur to the religious instruction and worship and proselytizing undertaken by the Good News Club. The district, considering the tender maturity of its audience, sought to ensure neutrality toward political, commercial and religious messages and inappropriate activities that could be misconstrued. Restricting access in this way is reasonable and viewpoint neutral, and thus passes muster under a free speech analysis.

Further, this kind of restriction is compelled, because to do otherwise would violate the Establishment Clause.

II. Religious instruction and services provided to elementary students immediately after school on school premises provide such an appearance of endorsement and school sponsorship to render it a violation of the Establishment Clause.

Even if Milford did open a public forum during the afternoon hours, restricting the Good News Club from the forum is consistent with Milford's constitutional responsibilities. If a forum were available, Milford would still be within constitutional bounds to exclude certain activities if to do otherwise would violate the Establishment Clause. As stated by this Court in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995): "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."

In *Lamb's Chapel* the Court left open the question as to whether a school may, or must, restrict religious services on school premises. In a footnote Justice White noted that because petitioners did not challenge the school's denial of

an earlier application for permission to hold religious services in the school at certain specified times, "the validity of the denial is not before us." *Lamb's Chapel*, 508 U.S. at 393 fn.6. Thus, the Court would not necessarily uphold a right of a church to use a school building for religious worship even though a broad spectrum of other groups were allowed to use the facility.

As this Court noted in *Lamb's Chapel* "[t]he District, as a respondent, would save its judgment below on the ground that to permit its property to be used for religious purposes would be an establishment of religion forbidden by the First Amendment. This Court suggested in *Widmar v. Vincent* [citation omitted], that the interest of the State in avoiding an Establishment Clause violation"may be [a] compelling" one justifying an abridgment of free speech otherwise protected by the First Amendment". *Lamb's Chapel* at 394.

Substantial litigation has been generated in an attempt to delineate the appropriate church-state relationship vis-à-vis education. Courts have been called upon to review various public school policies and practices to ensure that students are protected from religious inculcation by the state. Cases have dealt with First Amendment implications of such topics as state aid to parochial schools[10], religious activities and observances in public schools[11], and curricular accommodations for religious reasons in public education[12].

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[10] *See Committee for Public Education and Religious Liberty v. Regan*, 100 S.Ct. 840 (1980); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Board of Education of Central School District v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947).

[11] *E.g., Florey v. Sioux Falls School District*, 619F.2d 1311 (8th Cir. 1980); *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997).

[12] *E.g., Palmer v. Board of Education of City of Chicago*, 603 F.2d 1271 (7th Cir. 1979); *Stark v. Independent School District No. 640*, 123 F. 3d 1068 (8th Cir. 1997).

This Court has been vigilant in its rejection of public school religious observances, preventing the imprimatur of the school and state from being placed upon one religion or any religious activity. School sanctioned prayer and Bible reading in public schools have been declared unconstitutional[13]. Also, the observance of holy days[14] and the display of religious symbols[15] have been found to be unconstitutional within the context of the public schools. Schools cannot sanction prayer at graduation ceremonies[16], nor at the beginning of football games[17], or other school sanctioned events[18]. The Supreme Court has noted that whether or not religious observances in school are voluntary is irrelevant. When such activities are state-sanctioned, "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." [19] Here the question presented is whether religious instruction, proselytization, and worship services provided to elementary students immediately after school on school premises provides such an apparent endorsement of school sponsorship to render it unconstitutional.

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[13] See *School District of Abington Township v. Schempp, Murray v. Curlett*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962.

[14] *E.g., Altman v. Bedford Central School District*, 45 F.Supp. 2d 368 (S.D.N.Y. 1999).

[15] *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), cert. denied 115 S.Ct. 1822 (1995) in which the court found the presence of a portrait of Jesus in a public school was unconstitutional; *accord Joki v. Board of Education of Schuylerville Central School District*, 745 F.Supp. 823 (N.D.N.Y. 1990).

[16] *Lee v. Weisman*, 505 U.S. 577 (1992); *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000).

[17] *Santa Fe v. Doe*, 120 S.Ct. 2266 (2000).

[18] *See Chandler v. Siegelman*, 180 F.3d 1254 (11th Cir. 1999), *vacated and remanded* 120 S.Ct. 2714 (2000); *Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999), *reh'g en banc denied* 183 F.3d 538 (6th Cir. 1999) in which the court found prayer at the opening of a school board meeting unconstitutional as substantially different from *Marsh v. Chambers*, 463 U.S. 783 (1983) since the meetings were a part of the school and attended by students amd were mandatory for those wishing to appeal disciplinary decisions.

[19] *Engel v. Vitale*, 370 U.S. 421, 431 (1962); *accord* Santa Fe v. Doe, 120 S.Ct. 2266 (2000).

A. This Court has previously ruled that the practice of providing religious instruction on public school grounds is a violation of the Establishment Clause.

The Court has ruled that the practice of releasing students from regular school activities for religious education held on public school grounds violated the First Amendment[20]. *McCollum v. Board of Education of School District No. 17*, 333 U.S. 203 (1948) held unconstitutional the practice of providing released time for religious instruction in the public schools. The Court noted

> the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education . ... This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. .... To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not ... manifest a governmental hostility to religion or religious teachings.
>
> 333 U.S. 203 at 209 – 210.

The Court recognized that released time for religious instruction held off public school property is permissible in *Zorach v. Clauson*, 343 U.S. 306 (1952). However, in *Zorach* the students left the public school building to attend religious instruction. There the Court found no

[20] *McCollum v. Board of Education*, 333 U.S. 203 (1948).

Establishment violation. The Court found that this merely accommodated the religious needs of students, "respect[ing] the religious nature of our people and accomodat[ing] the public service to their spiritual needs." 343 U.S. at 314.

More recently, the Court declined review of a Fourth Circuit Court of Appeals decision sanctioning a "weekday religion program" in which students received religious instruction in a mobile unit parked on the edge of school property.[21] In a Fifth Circuit case the court held a school's "Clergy in School" volunteer counseling program unconstitutional. The clergy were to offer counseling to students, but not proselytize. The court found that the program had the primary effect of advancing religion, caused excessive entanglement, was coercive, and an endorsement of religion. *Doe v. Beaumont Independent School District*, 173 F.3d 274 (5th Cir. 1999).

In *Doe v. Human*, 725 F.Supp. 1503 (W.D. Ark. 1989), *aff'd*, 923 F.2d 857 (8th Cir. 1990) the practice of providing elementary school children an opportunity to attend Bible classes held during school hours in the school building and taught by non-school volunteers was found to be unconstitutional. Applying the standards in *McCollum*, the court rejected all the district's distinctions. The court held that even though the religious instruction was "nondenominational", it was clearly Christian and therefore sectarian. When the court applied the *Lemon* test, it also found the classes constitutionally infirm; although it did acknowledge that the primary purpose of the course could have been a secular one – to build character and form moral values, it clearly had the primary effect of endorsing Christianity. The court rejected the argument that the principle of "equal access" enunciated in *Widmar* required the school to permit the classes, pointing out that there had

[21] *Smith v. Smith*, 391 F.Supp. 443 (W.D. Va. 1975), *rev'd* 523 F.2d 121 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

been no policy of equal access at the school before this lawsuit and there was no history of other extracurricular activities being allowed a place in the school day.

Similarly, the rental of elementary school buildings immediately before and after school hours for holding of religious classes was found to be unconstitutional, where presence of school personnel, performing their official duties, juxtaposition of religious classes and secular classes, and use of public school facilities combined to give young children, including those present for religious classes, those present in school for other extracurricular activities, and those who were not present but who were aware that religious classes were being held, the erroneous impression of official school support. *Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985).

B. Under any standard of analysis for Establishment cases, allowing religious instruction in public elementary schools is unconstitutional.

The Court has used a variety of analyses to determine constitutionality in Establishment cases in the school setting. A chart of the various analyses used recently in these cases is displayed as an appendix. Three analyses predominate.

1. Lemon v. Kurtzman

Although the test set forth in *Lemon v. Kurtzman* has been criticized, decried and described as a somnolent ghoul[22], it has not been overruled.[23] Decided in 1971, *Lemon*

[22] *Lamb's Chapel v. Center Moriches Union Free School District,* (Scalia, J. dissenting).

[23] As stated by Justice White in *Lamb's Chapel: v. Center Moriches Union Free School District* " There is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled." 508 U.S. 384, 395 Fn. 7.

v. Kurtzman, 403 U.S. 602 (1971) incorporated the analyses of earlier cases, and formulated a three-prong test for determining whether the governmental action establishes religion. The first two prongs derived from *Abington*: "The test maybe stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 374 U.S. at 222. The third prong, proscribing excessive entanglement with religion, is derived from *Walz v. Tax Commissioners of City of New York*, 397 U.S. 664 (1970) in which the Court upheld tax exemptions for properties used solely for religious worship.

2. Lemon II

Justice O'Connor's modification of the *Lemon* test, asks whether an objective observer would perceive the policy and its implementation "as a state endorsement" of religion in the public school. Justice O'Connor first propounded her modification of the *Lemon* test in a concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984) in which the Court upheld the City of Pawtucket's inclusion of a nativity scene in its Christmas display, on the ground that overall, the display had the legitimate secular purposes of celebrating Christmas the holiday and depicting origins of that holiday; the benefit to religion was perceived as "indirect, remote and incidental." *Id.* at 669. Justice O'Connor asserted that even if a governmental practice has the "primary effect" of advancing or inhibiting religion," what is crucial is that a government practice not have the effect of communicating a message of government

endorsement or disapproval of religion." In *Santa Fe* Justice Stevens concluded than an objective Santa Fe student "will unquestionably perceive the inevitable pre-game prayer as stamped with her school's seal of approval." *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 2278 (2000) .

3. Coercion

In 1989 in *Allegheny County v. Greater Pittsburgh American Civil Liberties Union*, 492 U.S. 573 (1989) the Court held unconstitutional the county's practice of displaying a nativity scene in the county courthouse during the Christmas season. Justice Kennedy dissented, opining that the *Lemon* test should not be "our primary guide in this difficult area" and, instead, a "coercion" test should be employed. "Non-coercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." 492 U.S. at 662 – 663.

The common thread of all of these analyses is whether there is such a connection between the religious activity and the school that the imprimatur of the school is inevitably linked to the religious activity, regardless of whether the terminology used is endorsement, coercion, or primary effect. If the activity provides the appearance of preference to religious activity to the effected audience, a violation of establishment has occurred.

The Good News Club is a Christian organization for children between the ages of six and twelve. It is affiliated with the Child Evangelism Fellowship, a Christian missionary organization. The Second Circuit lays out the progression of "club meetings". 202 F.3d at 504- 505. The meetings are religious services and instruction for the

children, including prayer, witness, confession, and opportunities to be saved by receiving Jesus as savior. 202 F.3d at 507. It is clear that this is religious instruction, the same conclusion reached by the district court. Here, the Good News Club adopts a wholly religious demeanor in guiding children through a worship service[24]. This is not a film or instruction about religion; it is religious instruction, religious worship, and the inculcation of religion itself. There is a stark distinction between allowing a group to meet when it has an incidental connection to religion (such as Boy Scouts or 4-H) and allowing access to one whose quintessential meaning is to teach a specific religious doctrine, here, Christianity. The activities of the Scouts or the 4-H could exist in isolation, even without the organizational decision to incorporate a moral/religious dimension. By contrast, every Good News Club activity is infused with religious indoctrination and the entire purpose of the club is to impart the church's religious beliefs. But for the proselytizing and inculcation of religion, Good News would not exist.

The elementary school child who participates in the Good News Club will experience religious instruction during a natural extension of their school day. It is inevitable that the child will assume their church is a part of their school. For the child who does not participate in the after school religious instruction, it is inevitable that he/she will believe that there is a part of the school to which he/she does not rightly belong. These young children are left with the subtle coercion of joining the religious instruction or remaining outsiders within their own public school.

Under any of the Court's standards for determining an Establishment Clause violation, the regular use of elementary school premises for religious instruction and

[24] The nature of activity is as extreme as the distinction drawn in *Bronx Household of Faith v. Community School District No 10*, 127 F.3d 207 (2d Cir. 1997) between religious views and religious worship.

worship for elementary school children immediately at the close of school crosses the line.

C. The problem of a perceived endorsement of religion is heightened since the children involved are at a young and impressionable age.

The endorsement and coercion problems are exacerbated when one considers that the individuals involved here are young children[25] who would be even more likely to perceive an endorsement of religion when religious instruction is provided within their school building immediately after school. Courts have reached different conclusions on similar factual settings when the controlling difference has been the age of the children involved as an audience, i.e. when the religious practice has been moved from the university context to high schools to elementary schools.

For example in *Peck v. Upshur County Board of Education,* 155 F.3d 274 (4th Cir. 1998) the court found that an annual display of Bibles for optional student distribution was constitutional at the high school level, but unconstitutional at the elementary level. Noting what it believed this Court's holding might be on this distinction the court stated

> We can appreciate fully what might be the Court's thinking in this regard. In elementary schools, the concerns animated the coercion principle are at their strongest because of the impressionability of young elementary -age children. Moreover, because children of these ages may be unable to fully recognize and appreciate the difference between government and private speech – a difference that lies at the heart of the neutrality principle -- the County's policy could more easily be (mis)perceived as endorsement rather than neutrality. Thus, because our obligation as a court of appeals is to reason as we believe the Supreme Court would, we do hold that the School Board's policy is unconstitutional to the extent that it allows display of Bibles and other religious material in the elementary schools of the County.

Peck, 155 F.3d at 288 n.

In *Widmar v. Vincent,* 454 U.S. 263 (1981) the University of Missouri had refused to allow a religious group the use of university facilities because of fear of an Establishment violation. The Court ruled that to refuse religious groups access to facilities while allowing other groups to use the same facilities violated the students' free speech rights. The Establishment issue in that case did not counterbalance the free speech rights. However, the Court noted the distinct difference between elementary and secondary schools and universities within the context of establishment of religion. "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Widmar v. Vincent,* 454 at 274 fn. 14; quoted with approval in *Board of Educ. of Westside Community Schools v. Mergens By and Through Mergens,* 496 U.S. 226, 235 (1990).

In *Mitchell v. Helms,* 120 S.Ct. 2530, 2583 (2000)

> [W]e have expressed special concern about aid to primary and secondary religious schools. Tilton, 403 U.S., at 685-686, 91 S.Ct. 2091. On the one hand, we have understood how the youth of

[25] *Amici* imply that the relevant audience is parents, rather than the elementary children participating in the religious instruction. It is the perception of the elementary school children who are involved and their perceptions or misperceptions that is important here – do these children perceive that their church is an extension of their school. The perception of parents who sign permission slips for the after school religious instruction is only secondary.

the students in such schools makes them highly susceptible to religious indoctrination. Lemon, supra, at 616, 91 S.Ct. 2105 ("This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly"). *** Thus, government benefits accruing to these pervasively religious primary and secondary schools raise special dangers of diversion into support for the religious indoctrination of children and the involvement of government in religious training and practice.

And in *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) :

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. [Fn. 5 The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses. "This distinction warrants a difference in constitutional results."] Furthermore, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of

the State is it more vital to keep out divisive forces than in its schools.

It is clear in Supreme Court jurisprudence that constitutional standards for young children are in many cases different. Children are more impressionable and vulnerable and for those reasons we must be vigilant to guard against violations of their rights. For that very reason, the Equal Access Act, 20 U.S.C. 4071 – 4074 (2000) applies only to secondary schools, not elementary schools. The Act requires that whenever school districts permit other extracurricular clubs to meet, it must give equal access to student-led clubs that champion religious and political views. But the statute does not apply to elementary schools, adhering to the common wisdom that while secondary school students may be more likely to make independent judgments about religion, the same cannot be said of the younger, elementary -age children.

The bright line should be clear that adult-initiated worship and proselytizing has no place at the close of the elementary school day in part because of its potential for misunderstanding. It is that potential, coupled with the nature of the activity itself and the entanglements that it causes that makes an Establishment Clause violation egregious and inevitable. Even the best of intentions could lead to exploitation, teaching contrary to the wishes of parents, or misunderstandings by children of what is going on in classrooms normally reserved for subjects like math, science and reading rather than divine guidance and eternal salvation.

D. Prohibiting religious instruction to elementary children immediately after school does not result in hostility to religion.

This Court has noted that the state should not advance religion but neither should it be hostile to the

practice of religious beliefs.[26] Limiting religious instruction to off campus grounds is not hostile to religion more than necessary to comport with the Establishment Clause. It may be less convenient for parents to pick their children up from the church after their religious instruction, or transport them to and from the church for their religious instruction, rather than using the school's presence to gather and provide students on location for the purposes of receiving religious instruction. However, the convenience of parents does not rise to the level of a constitutional argument, nor does it prove school hostility to religion.

The practice of allowing students released time for religious instruction off school premises is sufficient to accommodate individual religious needs without running afoul of the Establishment Clause. Based on the Supreme Court action in this area many states have enacted laws outlining released time during public school hours for sectarian instruction conducted off school grounds.[27] Rejecting religious services and instruction to elementary children immediately after school on school grounds merely recognizes that some things are best left to personal conscience, and the direct influence of private decisions.

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[26] *E.g . Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819; *Zorach* at 314 – 315.

[27] California: Cal. Educ. Code 46014 (West 2000); Guam: 17 Guam Code Ann. 3107; Idaho: Idaho Code 33-519 (2000); Indiana: Ind. Code Ann. 20-8.1-3-22; Kentucky: Ky. Rev. Stat. Ann. 158.220 (2000); Maine: Maine Rev. Stat. Ann. Tit.20, 1224-A (2000); Massachusetts: Mass. Gen. Laws Ann. Ch. 76,1 (West 2000); Michigan: Mich. Comp. Laws Ann. 380.1561 (2000); Mississippi: Miss. Code Ann. 37-13-91 (2000); Montana: Mont. Code. Ann. 20-1-508 (2000); New Mexico: N.M.Stat. Ann. 22-12-3 (Michie. 2000); New York: N.Y. Educ. Law 3210 (2000); North Dakota: N.D. Cent. Code 15.1-19-04 (2000); Pennsylvania: 24 Pa. Cons. Stat. Ann. 15-1546 (West 2000); Rhode Island: R.I. Gen. Laws 16-2-16 (2000); South Dakota: S.D. Codified Laws 1333-10 (Michie 2000); Vermont: Vt. Stat. Ann. Title 16, 1055 (2000); West Virginia: W.Va. Code 18-8-1 (2000); Wisconsin: Wis. Stat. Ann. 118.155 (2000).

CONCLUSION

These are difficult questions, which may require lines to be finely drawn. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) We ask the Court to do "only what courts must do in many Establishment Clause cases – focus on specific features of a particular government action to ensure that it does not violate the Constitution." Id. at 852. The Second Circuit acted properly in its decision and should be upheld.

The Good News Club is seeking access to a forum not opened to others. Clearly, First Amendment analysis does not always require "the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants." *Rosenberger* at 862 (Thomas, J. concurring). But, this case is not that simple. The school had not opened an after-school forum, it had opened an evening forum for limited purposes. The district excluded all political, commercial and religious speech from the evening forum.

The exclusion of Good News from an afternoon forum can be justified as yielding to the Establishment Clause. The group can be excluded if to do otherwise would present a violation of the Establishment Clause. Here, Good News was proposing providing religious instruction, proselytizing and worship to elementary school children immediately after the school day on the school premises. Because of the impressionability of the children, the proximity of the activity to the regular school day, and the nature of the religious expression, i.e. worship and indoctrination, one must conclude that the reasonable elementary child would surmise that the religious instruction was endorsed by the district. As such, allowing the religious instruction to occur would create an Establishment Clause violation.

For the above reasons, these *amici* for the respondents urge this Court to affirm the Court of Appeals decision in this case.

Respectfully submitted,

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APPENDIX

Justices' Use of Analysis in Establishment of Religion Cases Involving Educational Settings

	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Mitchell v. Helms	L1,2	L1,2	L1,2	L1,2	L1,2	L1,2	L1,2	L1,2	L1,2
Santa Fe v. Doe	CC	C/L2E	C/L2E	CC	C/L2E	C/L2E	CC	C/L2E	C/L2E
Agostini v. Felton	L1,2	L1,2,3	L1,2	L1,2	L1,2	L1,2,3	L1,2	L1,2	L1,2,3
Rosenberger v. Rector	N/L2E	CC	N/L2E	N/L2E	N/L2E	CC	N/L2E	CC	CC
Kiryas Joel v. Grumet	A	CC	CC	A	CC	CC	A	CC	
Zobrest v. Catalina Foothills	CC	NA	NA	CC	A	CC	CC		
Lamb's Chapel v. Center Moriches	L2E	L2E	L2E	A	L2E	A	A		
Lee v. Weisman	A	C/L2E	C/L2E	A	C	C/L2E	A		
Westside v. Mergens	L2E	NA	L2E	C	C				
Edwards v. Aguillard	A	L2E	L2E	A					
Witters v. Washington	L1,2,3	L1,2,3	L2E						
Aguilar v. Felton	A	L2E	L2E						
Grand Rapids v. Ball	A	L2E	L2E						
Wallace v. Jaffree	A	L2E	L2E						
Mueller v. Allen	L1,2,3	L1,2,3							

L1 = 1st Prong of the Lemon test – legitimate secular purpose
L2 = 2nd Prong of the Lemon Test – primary effect neither advances nor inhibits religion
L3 = 3rd Prong of the Lemon Test - creates no excessive entanglement between state and religion
L2E = O'Connor's endorsement Analysis from Lynch v. Donnelly
C = Coercion or proselytizing analysis
CC = case comparison using Lemon or L2E cases; no explicit application of any "test."
A = Abandon Lemon Test
NA = no Establishment Clause analysis applied
■ = Authored an opinion (majority, plurality, concurrence, dissent)